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Supreme Court, U.S.
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No. 92-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M., INDIVIDUALLY,

Petitioner,

—against—

V.C., et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does petitioner have standing to raise claims on behalf of the fetus?

2. Are petitioner's constitutional rights under the Fourteenth Amendment implicated in the absence of state governmental action?

3. May a state court prohibit a woman from obtaining an abortion prior to fetal viability?

4. Does a man have a constitutional right to interfere with a woman's decision to have an abortion?

5. Is a fetus a "person" within the meaning of the Fourteenth Amendment?

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Respondent, V.C., submits this brief in opposition to the petition for a writ of certiorari filed by petitioner, J.M. The petition seeks review of the judgment of the New Jersey Supreme Court which dismissed petitioner's appeal on the ground that the appeal did not present any substantial constitutional question and the issues raised were governed by this Court's decision in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). *See Order, N.J. Sup. Ct., March 11, 1993*, App. Vol. I at A-221, 222.[1]

COUNTERSTATEMENT OF JURISDICTION

This Court does not possess jurisdiction to review the judgment of the New Jersey Supreme Court. First, petitioner lacks standing to assert the interests of the fetus, because a fetus is not a "person" with independent legal rights under the Constitution. Further, petitioner's assertion that this case implicates his own constitutional rights is frivolous, because the rights he asserts protect a person only against *governmental* action, and there is no governmental interference with petitioner's rights in this case. Consequently, no jurisdiction lies to hear the utterly meritless federal questions raised by the petition.

A. Petitioner Has No Standing To Raise Claims On Behalf Of The Fetus.

The law is clear that a fetus is not a person under the Fourteenth Amendment of the United States Constitution. *See infra* at 14-19. The conclusion necessarily follows that "an unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." *Poole v. Endsley*, 371 F. Supp.

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[1]All citations to materials in the appendix refer to Petitioner's Appendices submitted with the Petition for a Writ of Certiorari and are cited as "App. Vol. ___, at A-___."

1379, 1382-83 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975). *See also Brady v. Doe*, 598 S.W.2d 388 (Tex. Civ. App. 1980), *cert. denied*, 449 U.S. 1081 (1981); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 58 (Ch. Div. 1977) (dismissing claim to enjoin woman's abortion brought by self described guardian *ad litem* on behalf of the fetus); *In re D.K.*, 204 N.J. Super. 205, 497 A.2d 1298, 1302-03 (Ch. Div. 1985) (reversing appointment of guardian for the fetus as "unconstitutional and void").

Courts have refused to recognize claims of purported guardians *ad litem* in abortion cases and denied standing to individuals seeking to intervene to challenge a woman's right to choose abortion. *See, e.g., Woe v. Bear*, No. H-79-1866 (S.D. Tex. May 5, 1980); *Margaret S. v. Edwards*, No. 78-2765 (E.D. La. Oct. 2, 1978); *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (N.D. Ohio May 16, 1978); *Zbaraz v. Quern*, No. 77-C-4522 (N.D. Ill. May 15, 1978) (subsequent history on merits omitted); *Ryan v. Klein*, 412 U.S. 924 (1973);[2] *Doe v. Bolton*, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (three-judge court), *modified on other grounds*, 410 U.S. 179 (1973). *See also* Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 Wash. L. Rev. 503 (1991). Because the fetus is not a "person" under the Fourteenth Amendment, petitioner has no standing to raise any alleged constitutional rights of the fetus, and these claims are

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[2]In *Ryan*, intervenors purporting to represent embryos and fetuses appealed the ruling of a three-judge court holding unconstitutional New York's refusal to fund legal abortions. In a separate appeal by the State, this Court vacated the district court order and remanded the case for consideration in light of *Roe v. Wade*. *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973). On the intervenors' appeal, however, this Court summarily affirmed the district court, thus indicating its refusal to recognize claims of purported guardians *ad litem* in abortion cases.

not properly before this Court.

B. Petitioner's Constitutional Rights Under The Fourteenth Amendment Are Not Implicated Because There Is No State Action

The alleged federal questions raised by the petition concern petitioner's rights under the Fourteenth Amendment of the United States Constitution. *See* Cert. Pet. 2, 3. But the assertion that respondent's private abortion decision somehow implicates petitioner's constitutional rights is utterly frivolous. The federal constitutional rights cited by petitioner -- the right to procreate, the right to companionship with one's child and to discharge one's duties to one's child, and the right to equal protection of the laws -- protect a person only against *governmental* action. "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982). Every case petitioner cites as support for his constitutional claims involves governmental action affirmatively discriminating against or interfering with the autonomy of private individuals.[3] This, however, is not such a case.

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[3]*See Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of unfitness); *Craig v. Boren*, 429 U.S. 190 (1976) (*state* may not discriminate on the basis of gender in the sale of alcoholic beverages); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on unmarried status); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (*state and federal governments* may not deny welfare benefits to individuals who had resided in the administering jurisdictions for less than one year); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (*state* may not prohibit parents from sending their children to private schools).

For example, the Constitution certainly protects petitioner's right to be free from government intrusion into his decision to have a child. But it is up to petitioner, not lower court judges, to find a woman who will have a child with him. Rather than seeking protection against state interference with his constitutional rights, petitioner actually seeks to enlist the aid of the courts to seize control of V.C.'s body and compel her to bear his child. But the rights petitioner describes "involve[] a shield for the private citizen against governmental action, not a sword of governmental assistance to enable [the potential father] to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 130 (1974). Petitioner improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion to subordinate women.

Thus, because on their face the federal claims petitioner raises are entirely without merit, his mere allegation of a federal question does not establish jurisdiction in this Court. Where, as here, "such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no real room for controversy," no jurisdiction lies. *Equitable Life Ins. Soc'y v. Brown*, 187 U.S. 308, 311 (1902); *see also Zucht v. King*, 260 U.S. 174, 176 (1922).

COUNTERSTATEMENT OF THE CASE

Petitioner, J.M., filed a complaint alleging a relationship with respondent, V.C., which began in 1991. It is undisputed that the parties are not married. According to the complaint, in January 1992, V.C. became pregnant and decided to seek an abortion.

After retaining an attorney, on March 9, 1992, petitioner filed a complaint in the Superior Court of New Jersey,

Chancery Division. That same day, proceeding *ex parte* and without prior notice to V.C., petitioner applied for and was granted a temporary restraining order ("TRO") that, *inter alia*, enjoined V.C. from terminating her pregnancy and from leaving the State of New Jersey for the purpose of terminating her pregnancy. Petitioner asserted claims on his own behalf and sought to be appointed "guardian *ad litem*" for the fetus. Petitioner's requested relief, and the TRO that was entered, provided no exception should the continuation of V.C.'s pregnancy pose a threat to her life or health.

Respondent, V.C., moved on notice to dissolve the restraints and dismiss petitioner's complaint for failure to state a claim upon which relief could be granted. On March 19, 1992, after hearing argument from counsel, the trial court (1) dismissed petitioner's complaint to the extent it was brought by J.M., individually for lack of standing; (2) but declined to dismiss the complaint brought on behalf of the fetus; (3) appointed J.M. guardian *ad litem* to represent the interests of the fetus; and (4) continued the restraints imposed on V.C. The Court did not decide that the fetus had standing, nor that petitioner had shown a likelihood of success on the merits. Rather, the Court stated it *might* hold, after a plenary hearing, that the fetus is a "person" with rights protected under both the federal and New Jersey Constitutions.

On March 20, 1992, respondent moved on an emergent basis in the Appellate Division for leave to appeal from the trial court's order imposing the temporary restraints and declining to dismiss the complaint brought on behalf of the fetus. On March 23, 1992, petitioner moved for leave to cross-appeal from the dismissal of the complaint brought on behalf of himself individually.

On March 23, 1992, after hearing argument from counsel, the Appellate Division: (1) denied J.M.'s motion to cross-appeal the dismissal of this individual action; but also (2)

denied V.C.'s motion for leave to appeal the trial court's order her motion to dismiss the complaint in its entirety; and (3) granted V.C.'s motion for leave to appeal the trial count's order continuing the temporary restraints and summarily reversed and vacated the imposition of those restraints; but (4) stayed the dissolution of the restraints until 4:00 p.m. the next day, to give petitioner a chance to bring an application for emergent relief to the New Jersey Supreme Court.

Both sides sought leave to appeal to the Supreme Court of New Jersey on an emergent basis. Respondent moved to lift the stay, remove the restraints, and dismiss the complaint in its entirety. Petitioner sought to maintain the restraints, reverse the dismissal of his individual complaint, and have the entire matter remanded to the trial court for an evidentiary hearing on his contention that life begins at conception.

On March 24, 1992, determining that petitioner had "failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint," and concluding "that under current law, plaintiff's proffer of proofs would not realistically assist or inform the court in its determination of the legal issues properly before it," App. Vol. I, at A-177, 178, the New Jersey Supreme Court unanimously: (1) granted respondent's motion for leave to appeal the denial of her motion to dismiss the complaint brought by petitioner as guardian *ad litem* for the fetus, and dismissed the complaint; (2) granted respondent's motion to lift the stay of the Appellate Division's order dissolving the temporary restraints entered by the trial court, thereby dissolving the restraints; (3) denied petitioner's motion for leave to appeal the dissolution of the temporary restraints by the Appellate Division, dismissed as moot petitioner's motion for summary reversal, and denied petitioner's motion for a further stay; and (4) denied petitioner's motion for leave to appeal the dismissal of his individual complaint and dismissed as moot his motion for summary reversal on that issue.

On March 25, 1992 petitioner applied to Associate Justice David H. Souter for a stay of the New Jersey Supreme Court's decision. Justice Souter denied the stay. That same day petitioner reapplied to Associate Justice Clarence Thomas, who also denied the stay.

On March 31, 1992, petitioner moved in the New Jersey Supreme Court for reconsideration of the dismissal of his claim as guardian *ad litem* for the fetus, and moved in the Chancery Division for reconsideration of the dismissal of his claim as an individual. Petitioner's motion for reconsideration in the New Jersey Supreme Court was denied on April 6, 1992 and his motion for reconsideration in the trial court was denied on May 12, 1992. On May 18, 1992, petitioner filed a notice of appeal from the trial court order entered on March 19, 1992 dismissing his individual complaint.

On June 22, 1992, petitioner filed two separate but nearly identical petitions for certiorari with this Court, one allegedly on behalf of himself as an individual and one allegedly on behalf of the fetus, represented by petitioner as "guardian *ad litem*." Petitioner sought this Court's review of his claim as an individual -- the same claim raised herein -- even though that claim was still pending on appeal in the Appellate Division. In this Court, petitioner argued that the New Jersey Supreme Court's decision in this case was final as to both his claim as guardian *ad litem* for the fetus, and his claim as an individual. Simultaneously, petitioner argued in state court, that the New Jersey Supreme Court never reviewed petitioner's individual claim at all, so that he could continue to re-litigate these issues. This Court denied both petitions for writs of certiorari on October 5, 1992.

Respondent, V.C., filed a Motion for Summary Affirmance of the trial court's dismissal of petitioner's claim as an individual in the Appellate Division on July 31, 1992. On September 21, 1992 the Appellate Division granted

respondent's motion, dismissed petitioner's appeal, and ruled that "the determination presented for review [was] summarily affirmed." *N.J. Super. Ct. App. Div., Sept. 21, 1992*, App. Vol. I at A-185.

On November 4, 1992, petitioner filed a Notice of Appeal to the New Jersey Supreme Court. Respondent filed a Motion for Summary Affirmance or for Dismissal of the Appeal on December 21, 1992. On March 11, 1993 the New Jersey Supreme Court dismissed the appeal, holding the appeal failed to raise any substantial constitutional question and "is governed by current law. *Planned Parenthood v. Casey*." *Order N.J. Sup. Ct., March 11, 1993*, App. Vol. I at A-221, 222.

REASONS THE PETITION SHOULD BE DENIED

The petition should be denied because it fails to establish any of the factors that weigh in favor of review on a writ of certiorari: this Court's prior decisions are dispositive, the New Jersey Supreme Court properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of this case. *See* Sup. Ct. R. 10.1. As every appellate court has recognized, and as this Court reaffirmed in *Casey*, 112 S.Ct. at 2804, *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny clearly protect the right of every woman, including respondent, to choose to terminate her pregnancy prior to viability. These factors provided the basis for this Court's denial of petitioner's two prior petitions for writ of certiorari, and because petitioner here raises no new issues or questions that warrant review, certiorari should again be denied.

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE NEW JERSEY SUPREME COURT.

A. Every Woman Has a Constitutional Right To Decide Whether Or Not To Terminate Her Pregnancy.

Petitioner argues that the New Jersey Supreme Court's decision to dismiss petitioner's appeal was in error because it was based on this Court's decision in *Roe v. Wade*, which, in petitioner's view, did not directly decide the question of when human life begins, and whether fetuses are entitled to constitutional protection. *See* Cert. Pet. at 10. The petition, in large part, consists of purported evidence[4] intended to prove that life begins at conception. However, because this Court has clearly held that the Constitution protects a woman's right to choose to terminate her pregnancy prior to viability, and that a fetus is not entitled to constitutional protection, the New Jersey Supreme Court's reliance on *Casey*, 112 S. Ct. 2791, is correct and this petition should be denied.

In 1973, this Court recognized that the Constitution guarantees every woman the right to determine whether or not to terminate her pregnancy prior to viability. *Roe*, 410 U.S. at 153. In *Casey*, this Court reaffirmed this right stating, "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Casey*, 112 S.Ct. at 2804.

> The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v Wade*. It is a rule of law and a component of liberty we cannot renounce.

Casey, 112 S.Ct. at 2817.

Holding that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the

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[4]This evidence was not presented below and is not part of the record.

liberty protected by the Fourteenth Amendment," *Casey*, 112 S.Ct. at 2807, this Court reiterated *Roe's* protection of a woman's right to choose abortion:

> An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant . . . .[5]

Casey, 112 S.Ct. at 2812.

In *Casey*, this Court made clear that prior to viability, a State may not prevent a woman from obtaining an abortion. Although this Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus," *id.* at 2804, before viability "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.*[6] Therefore, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the intimate decision to terminate her

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[5]If petitioner's claims are accepted, not only would women be deprived of the right to abortion, but many forms of contraception would be illegal as well, since such a finding would effectively reverse this Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the decision to use contraception is a fundamental right).

[6]Even after viability, a State that chooses to regulate abortion must always provide exceptions to protect the woman's life *and* health. *Casey*, 112 S. Ct. at 2821, 2822. Thus, this Court continues to reject the argument advanced by petitioner that a state may only allow abortion where necessary to save the woman's life or "[w]here conception is not the result of voluntary conduct, in instances of rape and its equivalent." Cert. Pet. 63, n. 91; *see also* Cert. Pet. 62-63.

pregnancy before viability." *Id.* at 2821.

By seeking a court order absolutely prohibiting V.C. from having an abortion, petitioner would completely obliterate the constitutionally protected right to privacy recognized in *Roe* and reaffirmed in *Casey*. If a state can not ban abortions prior to viability, clearly a state court can not enjoin a woman from obtaining an abortion upon the application of an individual who disagrees with her choice.[7]

Nevertheless, petitioner argues that the woman's interest in terminating her pregnancy is outweighed by the fetus' right to life. Cert. Pet. 49-50.[8] However, because the fetus is not recognized as a "person" and because every woman is free to choose abortion prior to viability, petitioner's claims must fail. The New Jersey Supreme Court properly applied this Court's precedent in lifting the restraints imposed on V.C. and dismissing petitioner's appeal. Accordingly, the petition for a

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[7]The injunction petitioner sought below constituted state action even though the operative state actor was a court, not the legislature or executive. "A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way." *Ex Parte Virginia*, 100 U.S. 339, 347 (1880), *quoted in, Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984). Lower Courts have consistently held that an injunction prohibiting a woman from having an abortion constitutes State action. *See, e.g., Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 59 (Ch. Div. 1977).

[8]Petitioner also asserts that New Jersey courts hold that life begins at conception, but each of the cases he cites as authority are either preempted by *Roe, see Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d (1967); *Smith v. Brennan*, 157 A.2d 497 (1960); *Kelly v. Gregory*, 125 N.Y.S. 2d 696 (1953), or misinterpreted *see Hummel v. Reiss*, 129 N.J. 118 (1992) (concerning claims of wrongful life). *See* Cert. Pet 36, 37.

writ of certiorari should be denied.[9]

B. A Man Does Not Have A Constitutional Right to Interfere With A Woman's Decision To Have An Abortion.

Petitioner contends that the New Jersey Supreme Court's decision somehow conflicts with the decisions of this Court that recognize rights of a father to procreation, parenting, companionship, and equal protection. *See* Cert. Pet. at 54-60. However, none of these asserted rights can possibly be

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[9]Because petitioner's requested relief in the courts below prohibited V.C. from leaving the State to obtain an abortion, the injunction also violated respondent's constitutional right to travel. *See Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868). This Court recognized long ago that inherent in the nature of our federal union was the freedom to travel from state to state in search of a better life or to exercise a legal right. *Edwards v. California*, 314 U.S. 160 (1941). "The right to interstate travel is a right that the Constitution itself guarantees . . . [and] is a right secured against interference from any source whatever, whether governmental or private." *United States v. Guest*, 383 U.S. 745, 759-60 n. 17 (1966).

In 1973, this Court held that state imposed obstructions on a woman's right to travel to obtain an abortion were invalid. Concluding that the right to travel "must . . . protect persons who enter Georgia seeking the medical services that are available there," this Court invalidated Georgia's residency requirement for abortion as discriminatory towards those women traveling from out-of-state to obtain those services. *Doe v. Bolton*, 410 U.S. 179, 200 (1973). Two years later, this Court stated that Virginia could not "prevent its residents from traveling to New York to obtain those [abortion] services, or, as the State conceded . . . prosecute them for going there." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (citations omitted).

In dissolving the temporary restraining order preventing V.C. from obtaining an abortion in New Jersey or from traveling outside of New Jersey to obtain an abortion, and in dismissing petitioner's appeal, the New Jersey Supreme Court properly applied this Court's decisions protecting the right to travel.

implicated in this case, because there is no governmental action that interferes with petitioner's interests. *See supra* at 3-4. Moreover, none of these rights gives a man authority to prevent a woman from obtaining an abortion. Even aside from the absence of State action necessary to trigger constitutional protection of petitioner's rights, the simple fact is that petitioner does not and can not cite any case that actually holds that a man, in any capacity, has any right to interfere with a woman's decision to have an abortion. In fact, the applicable precedent is directly to the contrary.

As this Court held in *Casey*, a State can not prohibit or unduly burden a woman's choice to have an abortion prior to fetal viability. 112 S.Ct. at 2804. Neither, can a state permit a third party to exercise a veto over the woman's decision. *Id.* at 2831. In striking down Pennsylvania's husband notification requirement, this Court in *Casey* held,

> The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices . . . . A state may not give to a man the kind of dominion over his wife that parents exercise over their children.

Id. at 2831.

Distinguishing the very cases petitioner relies on here, *see* Cert. Pet. at 55 n. 85, this Court recognized that although "with respect to a living child . . . it would be reasonable to conclude as a general matter that the father's interest . . . and the mother's interest are equal . . . . [b]efore birth . . . the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a

woman is carrying will have a far greater impact on the mother's liberty than on the father's." *Casey*, 112 S.Ct. at 2830. For this reason, this Court held, the Constitution protects women from undue state interference with their abortion decision, "even when that interference is enacted into law for the benefit of their spouses." *Id.*

If a State can not compel a woman to notify her husband of her abortion decision, *a fortiori* a *non-spouse* can not be permitted to *veto* that choice. The injunction sought by petitioner therefore was an even more extreme invasion of the right of privacy than the statute struck down in *Casey*, and in lifting the injunction and dismissing petitioner's frivolous appeal, the New Jersey Supreme Court merely followed binding precedent.

C. A Fetus Is Not A "Person" Within The Meaning Of The Fourteenth Amendment.

Petitioner's entire argument is premised on the invalid assumption that a fetus is a child, and therefore a father has standing to protect the fetus' interests. Unless the Court accepts petitioner's claim that an embryo becomes a human being with full constitutional rights and protections upon the moment of fertilization, petitioner's whole argument fails. A large portion of the petition is devoted to alleged medical findings, most of which materials were never presented below. However, because the determination of legal "personhood" is governed by controlling precedent, this alleged medical evidence is irrelevant.

Petitioner also argues that overruling *Roe* is consistent with *stare decisis*, because new factual findings require reapplication of those facts to constitutional principles. However, petitioner has not presented any facts worthy of the reevaluation of longstanding precedent, much less the reversal of a long line of cases.

Finally, petitioner argues that the framers of the Constitution intended to include fetuses in the 14th Amendment's definition of "person," and therefore the New Jersey Supreme Court's decision is invalid. *See* Cert. Pet. 38-45. However, petitioner cites no legal authority supporting this absurd interpretation.

Roe v. Wade presented the first opportunity to decide whether a fetus is a "person" under the Fourteenth Amendment. After examining both the language of the Fourteenth Amendment and the relevant case law, this Court held that as a matter of law, a fetus is not recognized as a "person" and has no independent rights under the law. *See Roe*, 410 U.S. at 157-8. "[T]he unborn have never been recognized in the law as persons in the whole sense," this Court held, and "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158, 162. Since *Roe*, this Court has repeatedly refused to recognize independent fetal rights. *See Colautti v. Franklin*, 439 U.S. 379 (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). *Cf. International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (employer's "fetal protection" policy excluding women with child-bearing capacity from lead-exposed jobs violates Title VII). As Justice Stevens stated in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), "[n]o member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment." *Id.* at 779 n.8 (Stevens, J., concurring). Most recently, in *Casey*, Justice Stevens reiterated:

> Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing

reproductive autonomy.

Casey, 112 S.Ct. at 2839 (Stevens, J., concurring in part and dissenting in part).

Indeed, even Justice Scalia's opinion in *Casey* lends no support to petitioner's contention that a fetus is guaranteed constitutional rights. Justice Scalia argued that the "States may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so." *Id.* at 2873 (Scalia, J., concurring in part and dissenting in part) (emphasis in original). But if a fetus were recognized as a "person" with rights guaranteed under the Fourteenth Amendment, presumably States would be prohibited from allowing legalized abortion.

Petitioner argues that *Roe* should be overruled, but he submits no persuasive reason for doing so. Brushing aside concerns for *stare decisis*,[10] petitioner at first apparently admits that whether a fetus is a person is a "mixed question of fact and law." *See* Cert. Pet. 16. But petitioner can point to *no* development in the law that undermines *Roe*'s holding that a fetus is not a "person" under the Fourteenth Amendment.

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[10]Petitioner argues that *stare decisis* is "not a bar" to overruling *Roe* simply because this Court has overruled prior decisions before. Cert. Pet. 15. But in *Casey*, using a somewhat less simplistic analysis, this Court cogently observed:

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.

Casey, at 2816.

Indeed, lower courts have consistently followed this holding,[11] and petitioner cites no contrary authority.[12]

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[11]*Ruiz Romero v. Gonzalez Caraballo*, 681 F. Supp. 123 (D.P.R. 1988) (infant may not maintain claim under 42 U.S.C. § 1983 for prenatal injuries); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981) (fetus has no cause of action under 42 U.S.C. § 1983 or under the Constitution); *Civic Awareness of America, Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975) (taxpayers lack standing to sue on behalf of fetuses), *aff'd.* 532 F.2d 756 (7th Cir.), *cert. denied*, 429 U.S. 829 (1976); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974) (fetus not a child for purposes of Social Security Act and has no cause of action under Section 1983 or Fourteenth Amendment), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975).

[12]Conflating two separate issues, petitioner argues that the States's interest in potential life necessarily confers the status of legal personhood on the fetus. *See* Cert. Pet. 45-6. Once again, petitioner's confusing argument is presented with citations that, when examined, do not support his position. *Snapp v. Puerto Rico*, 458 U.S. 592 (1982), the primary case petitioner relies on, has absolutely nothing to do with abortion and, in any case, stands for exactly the *opposite* of what petitioner asserts. In *Snapp* this Court held that the common law approach to *parens patriae* standing that petitioner advocates here:

> has relatively little to do with the concept of *parens patriae* standing that has developed in American law. That concept does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved -- i.e., if the state is only a nominal party without a real interest of its own -- then it will not have standing under the *parens patriae* doctrine.

Snapp, 458 U.S. at 600.

Indeed, the fact that a state may have a legitimate interest in something does not confer upon that thing standing to raise claims. For example, although a state may have an interest in protecting trees, the trees themselves -- which are not persons -- have no standing to come into court and no individual has standing to raise claims on behalf of

(continued...)

Petitioner argues that overruling *Roe* is consistent with *stare decisis* because whether a fetus is a "person" turns on when human life begins. Cert. Pet. 12-14. Petitioner then launches into a lengthy and often unintelligible discussion of alleged recent developments and discoveries in science and medicine. Apparently, this exposition is designed to demonstrate that life begins at conception, although petitioner's repeated focus on late term abortions suggests he is advancing a somewhat mere modest claim. *See, e.g.*, Cert. Pet. 31.[13]

In any case, petitioner's argument is fatally flawed in at least two respects. First, petitioner never explains why the legal question of whether a fetus is a "person" under the Fourteenth Amendment turns on whether life begins at conception. Second, petitioner's factual assertions, whatever they may be worth, go not to the issue of when life begins, in terms of what characteristics a fetus must possess to be deemed human, but rather to what characteristics a fetus possesses. The proffered evidence does not prove that life begins at conception, but merely begs the question. In other words, the fact that an eight-week old fetus has fingers is not probative, for example, unless we know that fingers are what define human life.

Petitioner's factual assertions cannot answer this "difficult question of when life begins" precisely because it is a metaphysical issue whose philosophical and theological components necessarily frustrate consensus.

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[12](...continued)
trees or to be appointed "guardian *ad litem*" to represent alleged interests of trees.

[13]Petitioner's reference to a subsequent pregnancy of respondent, *see* Petition for Writ of Certiorari at 5, 9, is wholly inappropriate and irrelevant as that pregnancy is not, in any way at issue in this litigation.

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe, 410 U.S. at 159. In fact, there is no consensus in the scientific community that life begins at conception and such a conclusion, based as it is on philosophical and theological concerns, can not be drawn from the alleged medical evidence submitted by petitioner.

II. THE NEW JERSEY SUPREME COURT'S DECISION CONFORMS WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE.

A. No State Appellate Court Has Ever Held That A Man May Prevent A Woman From Obtaining An Abortion.

Since this Court's decision in *Roe v. Wade*, literally dozens of cases brought by husbands or putative boyfriends have sought to prevent women from exercising their right to choose abortion. To respondent's knowledge, every case has rejected the precise arguments petitioner makes here, and has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases where the man seeking the court order was the woman's husband, *see Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *cert. denied*, 488 U.S. 955 (1988); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115, *cert. denied*, 298 Md. 353, 469 A.2d 1274 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974); *Meyers v. Lewis*, No. 111440 (Mich. App. Sept. 15, 1988), *appeal denied*, No. 841469 (Mich. Sept. 22, 1988), *cert. denied*, 488 U.S. 967 (1988); *Steinhoff v. Steinhoff*,

No. 10549/88 (N.Y. Sup. Ct. June 29, 1988); *Anderson v. Anderson*, No. 881320 (Minn. Dist. Ct. July 8, 1988); *Hayes v. Hayes*, No. 85-CI-04460 (Tex. Dist. Ct. Mar. 27, 1985), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *see Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), *cert. denied*, 429 U.S. 919 (1989); *Doe v. Roe*, No. 88-1629 (N.Y. Sup. Ct. Sept. 14, 1988), *appeal dismissed as moot*, 552 N.Y.S.2d 75 (App. Div. 1990); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57 (Ch. Div. 1977); *Jones v. Smith*, 278 So.2d 339 (Fla. 1973), *cert. denied*, 415 U.S. 958 (1974); *Pagel v. Roe*, No. 83-765 (Wis. Ct. App. Apr. 21, 1983); *Yozie v. Munson*, No. 82/19 56 S (Conn. Super. Ct. Sept. 28, 1982). *See also Przybyla v. Przybyla*, 87 Wis. 2d 441, 275 N.W.2d 112 (Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress).

Throughout this litigation, petitioner has cited not even one case in conflict with the New Jersey Supreme Court's decision below. This case and the foregoing authorities were correctly decided, and there is no reason to disturb this clear and unbroken line of precedent.

B. Every Federal Court To Address The Issue Has Held That Husband Notice Or Consent Requirements For Women Seeking Abortion Are Unconstitutional.

Just as State courts have consistently held that men do not have a right to court orders enjoining their wives or girlfriends from having abortions, since this Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), invalidating Missouri's requirement of spousal consent for abortion, to respondent's knowledge every federal court to address the issue has struck down related statutory requirements of husband notice or consent for abortion, just as

this Court did in *Casey*, 112 S.Ct. 2791. *See, e.g., Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980); *Eubanks v. Brown*, 604 F. Supp. 141, 148 (W.D. Ky. 1984); *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 637 (D.R.I. 1984); *Scheinberg v. Smith*, 482 F.Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part, & remanded*, 629 F.2d 476 (5th Cir. Unit B Oct. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982); *Doe v. Deschamps*, 461 F. Supp. 682, 686 (D. Mont. 1976); *Wolfe v. Schroering*, 541 F.2d 523 (6th Cir. 1976).

Plainly, the decision of the New Jersey Supreme Court was fully in accord with *Casey* and these other federal decisions. Once again, petitioner cites no contrary authority, nor provides any reason for departing from this consistent line of cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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